United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

76-6199
77-4176

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Briefs

United States Court of Appeals

FOR THE SECOND CIRCUIT

GENERAL MOTORS CORPORATION, A Corporation of the State of Delaware,
Plaintiff-Appellee,

—against—

THE LONG ISLAND RAIL ROAD COMPANY, A Corporation of the State of New York,
Defendant-Appellant.

THE LONG ISLAND RAIL ROAD COMPANY,
Third Party Plaintiff-Appellant,

—against—

THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION,
Third Party Defendants-Appellees,

THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE,
Intervening Third Party Defendant-Appellee.

On Appeal From The United States District Court For The Eastern District Of New York.

(Additional titles appear on reverse side of this cover)

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER, THE LONG ISLAND RAIL ROAD COMPANY

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THE LONG ISLAND RAIL ROAD COMPANY,

Appellant,

—against—

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees.

On Appeal From The Interstate Commerce Commission.

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As is made clear in the brief of Intervening Third-Party Defendant-Appellee, The National Industrial Traffic League, the interpretation of the statutes and the law is the function of the Courts and they are not bound by the interpretations of an administrative agency although, if reasonable, clear and sound, the Courts may give weight to it. Where the factual determinations of the administrative agency are arbitrary, capricious or whimsical, the Courts are not bound by such findings but are free to make appropriate findings of fact from the evidence of record.

In the instant case, both the Interstate Commerce Commission and the Court below have misinterpreted Section 1(9) of the Interstate Commerce Act (49 U.S.C. §1(9)) and in regard to the findings of fact have, in effect, played a numbers game that approaches caprice and whimsey.

A. Misinterpretation of Section 1(9) of the Interstate Commerce Act.

The Interstate Commerce Commission (hereinafter ICC) in its Final Decision in Docket 35790 dated February 3, 1976, held that a carrier's obligation to establish a switch connection is not to be determined by the presence or absence of a contractual arrangement setting out reasonable terms (307a).* The ICC thus ignores the specific language of Section 1(9) which states that a common carrier upon application of a shipper ". . . shall construct, maintain and operate *upon reasonable terms* a switch connection with any . . . private sidetrack" (emphasis added).

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* Whether or not the agreement contains a provision for reimbursement of maintenance costs, it is universal practice in the railroad industry to require shippers to enter into a contractual agreement regarding sidetracks.

It is only by ignoring the underlined portion of Section 1(9) that the ICC is able to relegate the Long Island Rail Road (hereinafter LIRR) to recouping its maintenance cost from either the line-haul charge or by a separate tariff charge.* Similarly, the Court below, by affirming the ICC's aforesaid decision and in footnote 5 to its opinion (496a-497a) indicating that the proper way for LIRR to receive recoupment if the line-haul charge was inadequate would be to file a rate increase, in essence, committed the same misinterpretation of Section 1(9) that was done by the ICC.

It is absolutely clear that a carrier is entitled to require a shipper to enter into a reasonable agreement if the shipper wishes to have a private sidetrack connection constructed, operated and maintained. While it is true that if the carrier is being fully recompensed for its expenses by the line-haul rate, it cannot require a shipper to pay for the same expense twice by way of contractual obligations, it is also clearly intended by the statute that if a carrier is not being so recompensed, it can, as a condition of further service, require the shipper to assume the burden of actual maintenance costs by way of a clause in a standard sidetrack agreement. Thus, the Court below and the ICC have both misinterpreted Section 1(9).

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* This apparently only applies to the LIRR since the ICC specifically found in Docket 36143, *Allied Container Corp.* v. *Maine Central Railroad Co.* (Annexed as Addendum A to LIRR's Original Brief filed herein) that a clause in a sidetrack agreement requiring the shippers to bear such maintenance costs did not violate Sections 1(3), (4), (6) or (9) of the Interstate Commerce Act.

B. The Findings of Fact are Arbitrary and Capricious.

The record discloses that in 1972 the LIRR handled 65,000 freight cars (383a) had total freight revenues of $9,189,857 and a deficit from freight operations of $11,-461,373. In 1975, the LIRR handled 55,208 freight cars (556a; 580a), had total freight revenues of $15,524,000 and a freight deficit of $14,203,000 (681a). From these figures it can be seen that in 1972 the average revenue per car to the LIRR was about $141 and the average expense was about $318 per car or a loss of approximately $177 per car. In 1975, the average revenue per car was about $282 per car and the average expense was about $540 per car or a loss of about $258 per car.

Neither Administrative Law Judge Reis in his Initial Decision dated May 6, 1974, (224a) nor the ICC, Division 3 in its Decision and Order dated June 10, 1974, (285a) made any findings in regard to whether or not the line-haul rate compensated LIRR for its cost of maintaining the switch connection to the Bethpage plant of General Motors Corporation (hereinafter GM). It was only in the Final Decision of the ICC dated February 3, 1976, (302a) that as an aside it was found that the LIRR had ". . . not established that the line-haul rates do not fully compensate it for the maintenance of a switch connection at issue" (308a). However, a year and a half later in Docket 36516, the Commission found on the basis of 1975 cost evidence that the revenue on GM traffic failed to cover even its variable costs much less its fully allocated costs (797a). In this regard it found LIRR's method of computing the average variable line-haul cost for all carriers of a GM car at $789 more preferable than GM's contention of $580 per car and whether compared to the total line-haul revenue per car of $602 as claimed by GM or the $500 as shown by LIRR, the loss per car was substantial.

Despite these loss figures, the ICC in Docket 36516 found that the LIRR had failed to show that its $4.39 per car charge was reasonable and directed its cancellation. This finding was based on the inability of LIRR's Assistant Chief Engineer-Maintenance of Way to furnish anything more than an estimate of the cost of maintaining the switch connection. Obviously, if the LIRR had any more concrete figures, they would have been furnished.

The fact is that the LIRR has never really wanted or sought to impose a per car charge and in this instance only did so because both the ICC and the Court below indicated that this was the proper method if the line-haul rate failed to reimburse the railroad. The LIRR feels and contends the proper and permissible methods is to require the shipper to enter into a reasonable agreement whereby it will reimburse the LIRR for such actual costs as are incurred at such time as they are incurred. Since such an agreement would limit the reimbursement to costs actually incurred and only when they are incurred, there can be no question of its reasonableness. Similarly, at this stage, there is no question but that the line-haul rate does not reimburse LIRR for these costs but unless the judgment and the permanent injunction of the Court below is set aside, the LIRR cannot require GM to enter into such a reasonable agreement as is clearly authorized by Section 1(9) and recognized by the ICC in *Allied Container Corp., supra.*

CONCLUSION

It is respectfully requested that the judgment of the Court below in 76-6199 be set aside and vacated and remanded with directions to refuse to enjoin the LIRR from declining to serve GM's private siding unless and until GM signs LIRR's standard sidetrack agreement under

which GM will reimburse LIRR for actual maintenance costs when and as incurred and billed. In the alternative, this Court should set aside, annul and vacate the August 26, 1977 Report and Order of the ICC, directing the cancellation of LIRR's Freight Tariff No. 72.

Respectfully submitted,

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Defendant-Appellant

State of New York, County of New York, ss.:

Raymond J. Braddick, , being duly sworn deposes and says that he is agent for George M. Onken Esq. the attorney for the above named Defendant-Appellant herein. That he is over 21 years of age, is not a party to the action and resides at 11 Park Place New York

That on the 3rd. day of March , 1978, he served the within
Reply Brief

upon the attorneys for the parties and at the addresses as specified below

see attached list

by depositing 2 true copies to each
to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly maintained by the United States Government at
90 Church Street, New York, New York
directed to the said attorneys for the parties as listed above at the addresses aforementioned, that being the addresses within the state designated by them for that purpose, or the places where they then kept offices between which places there then was and now is a regular communication by mail.

Sworn to before me, this 3rd.
day of March, 1978

Raymond J. Braddick

ROBERT W. JOHNSON,
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977